

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,  
*Plaintiff-Appellant*  
and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Intervenor Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION,  
*Defendant-Appellees*

and

ERIE-LACKAWANNA RAILROAD COMPANY,  
*Intervenor Defendant-Appellee*

Appeal from the United States District Court for the  
Eastern District of Michigan

**REPLY OF APPELLANTS TO MEMORANDUM OF  
APPELLEE ERIE-LACKAWANNA RAILROAD  
COMPANY ON THE QUESTION OF THE  
JURISDICTION OF THIS COURT**

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No. 681

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On February 3, 1961, the Erie-Lackawanna Railroad Company filed with this Court a memorandum in which it presented three points for the consideration of the Court. It requested this Court to restrict the issues to be considered on appeal; it opposed the renewed

application for stay; and, it waived its rights to file a motion to affirm, but in so doing suggested that this Court might affirm *sua sponte* the lower Court's decision and offers five reasons in support of such suggestion.

Appellants have filed their reply to Erie-Lackawanna's opposition to the renewed application for stay in a separate document addressed to the Honorable Potter Stewart. However, the first and third points presented in the Erie-Lackawanna memorandum are directed to the issue of the jurisdiction of this Court. Lest a failure to reply to those points be regarded as a concession of their accuracy, appellants herewith submit this brief reply to the arguments of Erie-Lackawanna in support of its requests that this Court limit the issues to be considered on this appeal and affirm on its own motion the decision below.

## I

**THE QUESTIONS PRESENTED IN THE JURISDICTIONAL STATEMENT ARE THE PROPER QUESTIONS TO BE CONSIDERED BY THIS COURT**

The Erie-Lackawanna's attempt to restrict the issues in this case is a bit difficult to comprehend since it does not claim that they have no factual basis in the record. Erie-Lackawanna's entire argument is based upon a claim that the primary issue was *phrased* differently below. It seems to appellants that it is solely within the province of each party to phrase the issues as it believes them to be presented by the factual situation and the law. It is then this Court's prerogative to determine whether they are accurately phrased.

The Erie-Lackawanna memorandum at pp. 24,

states that there is but one question presented on this appeal and sets forth that question as follows:

"Whether Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906, 49 U.S.C. § 5(2)(f)) requires the Commission to impose as a minimum, upon every transaction approved under Section 5(2) the requirement that every employee affected by an approved transaction must be retained in an active employment status for a period equal in time with his service to the railroad, not to exceed four years."

The issue as set forth by the Erie-Lackawanna is a paraphrase of the issue as viewed by the court below. It does not properly state the question presented here since it confines the requirements of Section 5(2)(f) to continued "active employment" while the statute itself requires more than mere active employment. The statute clearly states that an employee shall not "be in a worse position with respect to his employment." (Emphasis supplied.)

The primary question presented by this appeal is the first question set forth at page 5 of the jurisdictional statement. The other questions relate to specific errors which appellants contend were made by the Commission, and the District Court in upholding the Commission.

Obviously, the general problem presented to this Court concerns the proper interpretation of Section 5(2)(f) but the issues presented must be related to the manner in which that problem was treated by the District Court and the Commission. The five questions set forth in the jurisdictional statement present that problem in the light of the manner in which it was handled below.

## II

**THE QUESTIONS PRESENTED ARE SUBSTANTIAL**

The third point contained in the memorandum of the Erie-Lackawanna (pp. 9-11) is entitled "The Reasons Why Erie-Lackawanna Is Waiving the Filing of a Motion to Affirm." The Erie-Lackawanna specifically states that it waives its right to file such a motion and offers as its only reason for doing so the fact that an ultimate decision on the merits of the case may be delayed if a motion to affirm were filed and this Court noted probable jurisdiction.

Immediately after giving its reason for waiver, the Erie-Lackawanna goes on to state that this Court might affirm *sua sponte* the decision below on the basis of the Commission and District Court opinions and proceeds to list five reasons which it believes supports such action by this Court. The reasons given by Erie-Lackawanna are answered in the jurisdictional statement filed with this Court on January 27, 1961. Therefore, appellants will not burden the Court with further argument at this time but merely will list the five reasons offered by Erie-Lackawanna and refer to the pages of the jurisdictional statement where they are answered.

1. The Erie-Lackawanna claims that the plain language of Section 5(2)(f) does not require continued active employment and cites the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, and the Communications Act of 1943, 57 Stat. 5, as support for this contention. (See Jurisdictional Statement, pp. 22-23.)

2. The Erie-Lackawanna contends that appellants cannot demonstrate that the original language of

the Harrington amendment and the modified language of that amendment as it appears in the present law were intended to provide the same protection. (See Jurisdictional Statement, pp. 18-20, 24.)

3. The Erie-Lackawanna contends that the Commission has "consistently imposed compensatory conditions upon all transactions approved under Section 5(2)" and that the RLEA has concurred in the imposition of such conditions. (See Jurisdictional Statement, pp. 13-16; 21-22.)

4. The Erie-Lackawanna cites this Court's decisions in *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950) and *Order of Railroad Telegraphers v. Chicago and N. W. Ry.*, 362 U.S. 330, 345 (1960) as an indication by this Court that "Section 5(2)(f) does not require complete preservation of employment." (See Jurisdictional Statement, pp. 16-18.)

5. The Erie-Lackawanna contends that "policy reasons" cited by the court below and the Commission indicate that denial of appellants' contentions would be "sound and well considered." (See Jurisdictional Statement, p. 13.)

#### CONCLUSION

In view of the foregoing it is respectfully submitted that the questions set forth in the jurisdictional statement are the proper questions to be considered on this appeal and that the primary question of whether the protection afforded by Congress to shield the labor force of the railroad industry from the effects of wholesale mergers resulting from the enactment of Section 5(2)(f), as interpreted by this Court in *Railway Labor*



*Executives' Association v. United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721, and *The Order of Railroad Telegraphers v. Chicago and North Western Railway Company*, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed. 2d 774, is to be granted or denied the employees comprising that labor force, presents a substantial question for consideration by this Court.

Respectfully submitted,

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